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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

CALIFORNIA AIR RESOURCES BOARD, Plaintiff and Appellant, v. FRANKLIN FUELING SYSTEMS, INC., et al., Defendants and Respondents.	B252455 (Los Angeles County Super. Ct. No. BC443564)

APPEAL from a judgment of the Superior Court for the County of Los Angeles. Mark V. Mooney, Judge. Affirmed.

Kamala D. Harris, Attorney General, Robert W. Byrne, Assistant Attorney General, Gary E. Tavetian, Diana J. Vernazza and Daniel Lucas, Deputy Attorneys General, for Plaintiff and Appellant.

Stoel Rives, Edward C. Duckers, Melissa A. Jones and Jonathan A. Miles for Defendants and Respondents.

SUMMARY

The California Air Resources Board (plaintiff or the Board) appeals from a trial court judgment finding the Board failed to prove defendant manufacturers violated an air pollution statute, along with regulations and executive orders implementing the statute. The statute at issue prohibits the sale of components of a gasoline vapor recovery system that have not been certified by the Board, and the executive orders prohibit any alteration in the equipment parts certified by the Board unless the alteration has been approved by the Board. We find no error and affirm the judgment.

BACKGROUND FACTS

The Board is our state's air pollution control agency, responsible for the administration and enforcement of laws regulating the emission of air contaminants. This includes setting standards for, testing and certifying vapor recovery systems for use in gasoline stations. These systems recover gasoline vapors released when vehicles are refueled, preventing escape of contaminants into the atmosphere. These systems may not be sold or installed until the Board tests them and certifies their compliance with specified emissions standards.

In 2005, Healy Systems, Inc., the predecessor of defendants Franklin Fueling Systems, Inc. and Franklin Electric Co., Inc., obtained certification for the first (and then only) enhanced vapor recovery (EVR) system. (Previous systems were much less efficient.) We will refer to this as the Healy EVR System. One of the several components of the system certified by the Board was a nozzle, identified as the Healy 900 nozzle.

Inside the Healy 900 nozzle is a mechanism consisting of a diaphragm, plus an orifice post and a spring. This mechanism, which we will refer to simply as the diaphragm, is designed to recognize vehicles (1998 and newer models) equipped with their own vapor recovery systems (called onboard refueling vapor recovery or ORVR systems) and older vehicles that are not. By distinguishing between the older and newer vehicles, the diaphragm ensures that vapors from the older vehicles are channeled back to

the gasoline station's underground storage tank, and restricts the path of vapors from newer ORVR-equipped vehicles, preventing vapor growth in the storage tanks.

In August 2010, after events in 2007 and 2008 we will describe *post*, the Board filed a complaint for civil penalties against defendants. At the core of the Board's lawsuit was the claim that, during an investigation of incidents in which "degradation alarms" at gasoline stations showed excessive amounts of gasoline vapors escaping during refueling, the Board discovered that defendants were using diaphragms in the Healy 900 nozzle "that were not approved as part of the certified system." The Board alleged the diaphragm "was made with a mold and a material that was different from that submitted with the Healy 900 system for [Board] certification," and defendants "never submitted those two changes . . . to [the Board] for evaluation and certification as modifications to the originally certified Healy 900 nozzles."

The Board further contended that "the uncertified Healy 900 nozzles failed to meet [Board] requirements pertaining to the efficiency rate for vapor emissions capture," and that defendants "illegally sold over 7,550 of these uncertified nozzles in California." This resulted, the complaint alleged, in "an estimated minimum of 55 tons" of gasoline vapors that should have been captured but instead escaped into the environment.

Based on the asserted violations, the Board sought civil penalties "of not less than $25 million."[1]

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[1] Health and Safety Code section 42402 imposes strict liability for civil penalties on a person who violates specified statutory air pollution control provisions, or any rule, regulation or order of the Board issued pursuant to those statutory provisions. This strict liability civil penalty is up to $1,000 per day or up to $10,000 per day if the violation was the result of negligent or intentional conduct. (§ 42402, subds. (a) & (b).) In addition, if the violation causes the excessive emission of pollutants, civil penalties are higher: negligent emission of air contaminants is subject to penalties of up to $25,000 (§ 42402.1); knowing emission with failure to take corrective action is subject to penalties of up to $40,000 (§ 42402.2); and willful and intentional emission is subject to penalties of up to $75,000 (§ 42402.3). The Board's complaint alleged all of these penalty levels based on defendants' sale of uncertified components.

Defendants' answer to the Board's complaint admitted that, in February 2007, defendants "began manufacturing, offering for sale, and selling Healy Systems that contained an [ORVR] diaphragm made of a new material," and that they "did not seek approval of the new diaphragm material from [the Board]." Among other defenses, defendants asserted the Board's complaint did not state facts that constituted any cause of action against them, and that, had they known the Board considered the nozzle to be uncertified or inconsistent with its certification, they would have immediately halted sales.

THE APPLICABLE LAW

Before we recount the facts adduced at trial, we summarize the statutory and regulatory provisions under which the parties operate, and for the violation of which the Board sought penalties, namely: Health and Safety Code section 41954, subdivision (f) (section 41954(f)); section 94011 of title 17 of the California Code of Regulations (Regulation 94011); and the executive orders the Board issued when it certified the Healy EVR System.

First, section 41954(f) provides: "No person shall offer for sale, sell, or install any new or rebuilt gasoline vapor control system, or any component of the system, unless the system or component has been certified by the state board and is clearly identified by a permanent identification of the certified manufacturer or rebuilder."

Second, Regulation 94011 contains a certification protocol known as CP-201. CP-201 governs the certification procedure – performance standards and specifications, the application process, certification testing, and so on. An application for certification must include a complete description of the system concept, design and operation, including "[e]ngineering drawings of system, components, and underground piping and tank configurations for which certification is requested." (CP-201, §§ 11.1 & 11.1.2.)

CP-201 also governs documentation of the certification. It requires documentation "in the form of an Executive Order listing the criteria requirements of installation and operation of a certified system." (CP-201, § 15.) The executive order "shall include" a "list of components certified for use with the system"; applicable performance standards,

performance specifications and test procedures; applicable operating parameters and limitations; warranty periods; and factory testing requirements, if applicable. (CP-201, § 15.1-§ 15.1.1.)

Third, the executive orders the Board issued certifying the Healy EVR System contained several provisions pertinent to the dispute in this case. Although CP-201 requires an executive order to include a "list of components certified for use with the system," and the executive orders here stated that "exhibit 1 contains a list of the equipment certified for use with the Healy Phase II EVR System," exhibit 1 lists the nozzle, but contains no mention of the diaphragm. Similarly, exhibit 2 to the executive orders contains installation, maintenance and compliance standards and specifications for the nozzle, including a drawing, but nothing about the diaphragm. And exhibit 3 contains manufacturing performance standards and specifications for the nozzle, but nothing about the diaphragm. (Exhibit 3 specifies that "[a]ll components (Exhibit 1) shall be manufactured as certified; no change to the equipment, parts, design, materials or manufacturing process shall be made unless approved in writing by the Executive Officer . . . ."

The executive orders also separately state substantially the same requirement as just quoted from exhibit 3: "IT IS FURTHER ORDERED that any alteration in the equipment parts, design, installation, or operation of the system certified hereby is prohibited and deemed inconsistent with this certification, unless the alteration has been submitted in writing and approved in writing by the Executive Officer or Executive Officer delegate."

FACTS ADDUCED AT TRIAL

The court conducted a bench trial that began in December 2012, with seven days of testimony from a dozen witnesses, plus deposition testimony from other witnesses, and the admission of more than 200 exhibits. Evidence was presented on numerous points, as the Board sought to show not only that defendants sold uncertified components, but also that the sale of those uncertified components was negligent, knowing, willful and intentional, and resulted in the emission of air contaminants in excess of allowed levels.

It is unnecessary to recite a great deal of the evidence presented, as many of the disputed points are irrelevant to a resolution of the fundamental legal issue: whether defendants' admitted alteration of the diaphragm without seeking approval necessarily meant that defendants sold uncertified components in violation of the statute. Because we conclude it did not, and substantial evidence supported the trial court's finding the Board did not prove that defendants sold uncertified components, it is unnecessary to describe in detail the Board's unsuccessful efforts to prove those components caused the excessive emission of pollutants into the environment.

In addition to the documentary evidence outlined above, showing the diaphragm itself was not a component the Board certified in its executive orders, the evidence at trial established the following facts useful for an understanding of the genesis and development of the Board's lawsuit.

The diaphragms at the center of the dispute were fabricated by a third party, using a "GFLT resin" made by DuPont as the principal ingredient. No later than March 2005 (shortly before the Healy EVR System was certified), the third party had informed Healy Systems that DuPont was phasing out the manufacture of that material (with which the third party fabricated green diaphragms) and replacing it by year-end. The third party fabricator developed an equivalent material, purple in color, using another DuPont "GFLT" material as the main ingredient.

Healy Systems immediately sought testing and approval from Underwriters Laboratories (UL), a nongovernmental, international safety standards agency that tested, and whose approval was required, for all of Healy Systems' products. UL testing was completed and approval obtained in June 2006, with Carl Griffin of Healy Systems observing that "[t]his means we can now use the new . . . diaphragms when the need arises."

The third party fabricator initially used a four-cavity mold (each mold making four diaphragms) to produce the green diaphragms. In March 2006, while UL was testing the purple diaphragm, Healy Systems approved the fabricator's request to make a new nine-cavity mold to produce the diaphragms.

By early February 2007, there were no more green diaphragms, and the purple diaphragms were being used in the Healy 900 nozzles.

In the fall of 2007, defendants, who had acquired Healy Systems in mid-September 2006, first became aware of the green-to-purple diaphragm change, as did the staff at the Board. The change came to light because of a number of "degradation alarms" generated by "In-Station Diagnostic" (ISD) systems. These ISD systems, installed at most gas stations in connection with the Healy EVR System, monitored the performance of the vapor recovery system. (There are two otherwise identical executive orders certifying the Healy EVR System, one with the ISD system and one without.) The ISD system, manufactured by a competitor of defendants, produces a degradation alarm when vapor recovery performance falls below a certain threshold.

In late August 2007, the Board learned of unexplained ISD alarms at what was initially reported to be "numerous facilities." Defendants' competitor informed the Board of its belief the Healy 900 nozzle was causing the problem, and told the Board on September 13, 2007, of the change from the green to purple diaphragm. The Board initiated an investigation of several potential causes of the unexplained alarms, but did *not* instruct defendants to stop selling the nozzles with the purple diaphragms. (Almost half of the 7,551 nozzles with purple diaphragms sold and installed in gasoline stations were sold after the Board learned of the change, and altogether defendants sold to distributors another 8,000 nozzles with purple diaphragms that were not yet in use.)

The "numerous facilities" with unexplained ISD alarms turned out, in the end, to be *only one* gas station. William Loscutoff was chief of the division at the Board responsible for vapor recovery certification at the time of these events. He initially testified that he had heard of about 50 or so gasoline stations in "alarm mode," but had no personal knowledge of the number. He concluded that an alarm problem at 50 or so gasoline stations "was not widespread." Another Board witness testified that he could not remember exactly, but that "[p]robably more than 10, less than 20" stations around the Sacramento area were in alarm. Still another witness from the Board testified he understood there were "a handful of stations" with ISD alarms.

In the end, Ranjit Bhullar, the Board's lead investigator into the cause of the alarms, could identify only two stations with degradation alarms: an ARCO station in Elk Grove, and a Costco station in Tustin. (The problem at the Costco station in Tustin was later determined to involve a "program bug" in the ISD system.) Mr. Bhullar also testified that the absence of alarms "is a good indicator that you should be . . . operating at the same level that the system was certified at."

Nonetheless, having found the alteration in the diaphragms, the Board decided to conduct efficiency testing of nozzles with the purple diaphragm. (When using summer fuel, an EVR system must be 95 percent efficient at capturing gasoline vapors from the older (non-ORVR) vehicles, and must achieve a hydrocarbon emission factor not to exceed 0.38 pounds/1,000 gallons for both newer ORVR vehicles and older non-ORVR vehicles. When using winter fuel, the system must meet one or the other of those standards. (CP-201, § 4.1.1.))

In late October and early November 2007, the Board conducted testing on a single Healy 900 nozzle with a purple diaphragm, serial number 22 07 431, that was in use at the Elk Grove ARCO station. This was a nozzle that had already caused an unexplained ISD degradation alarm. *This was the only in-use nozzle with a purple diaphragm that the Board tested*. It failed to meet the 95 percent efficiency standard, testing at approximately 88 percent efficiency. The Board did not test *any* in-use nozzle with a purple diaphragm that was *not* causing alarms; a Board witness later acknowledged that "I would want to test both." The Board's testing used a 50-car matrix, while certification of a system requires use of a 200-car matrix. A Board witness testified he could not "extrapolate our results from 50 cars out to 200 . . . ."

Later in November 2007, the Board tested a second nozzle that was never in use at any gasoline station. This was a prototype ("straight out of the box") nozzle with a purple diaphragm, serial number 37 07 463, submitted by defendants to see if it would pass efficiency testing. (Ordinarily, "you don't just take something new out of the a [*sic*] box and run a test on it to see whether it meets the 95 percent efficiency standard.") Defendants had modified the nozzle for testing purposes by using a shaved orifice plug,

in an attempt to address the possibility that "hot fueling" (very hot gas in the vehicle tank and much cooler gas in the storage tank) was causing the ISD alarms. This prototype nozzle also failed efficiency testing; its test results were much worse than the in-use nozzle tested earlier.

By November 17, 2007, Mr. Loscutoff had concluded the purple diaphragm was the reason for the degradation alarms. Don Kenney, president of Franklin Fueling, did not share that conclusion, but "there was a lot of pressure being put on" Franklin Fueling to satisfy Mr. Loscutoff's concerns. Among other things, Mr. Kenney induced DuPont to manufacture another batch of the green material, and the fabricator began the production of green diaphragms. The green material was not identical to the original green material, because a lead additive could no longer be used. But in January 2008, defendants submitted new nozzles with the reconstituted green diaphragm to the Board. Initial tests were unsatisfactory, but after the Board "aged" the nozzle, they resumed testing and obtained results acceptable to the Board.

In late February 2008, defendants began a retrofitting program that was completed in mid-April, incurring almost $2 million in costs to replace all the purple diaphragms with the new green ones. Mr. Kenney did not think the retrofitting was necessary, in light of the limited ISD alarms and the minimal testing done, but did so "[b]ecause that's what [the Board] insisted we do."

In early May 2008, defendants, after an investigation, reported to the Board that 11 other enhancements had been made to the Healy 900 nozzle without notifying the Board. Some of the changes had been incorporated before, and some after, defendants acquired Healy Systems. The Board did not claim any of these changes violated the statute or regulations. Then, in October 2008, the Board issued a notice of violation relating to the unreported change from green to purple diaphragms, culminating in this lawsuit.

At the trial, Mr. Bhullar used the results of the tests of the two nozzles described above – the one in-use nozzle that had caused degradation alarms, and one prototype modified for test purposes – to support his testimony that the unauthorized change from

green to purple diaphragms had caused the release of contaminants into the atmosphere. Mr. Bhullar averaged the excess emissions of the two nozzles (0.07 and 0.63 lbs per 1,000 gallons dispensed, respectively), and extrapolated that average to all 7,500 Healy 900 nozzles in use with the purple diaphragm. This resulted in Mr. Bhullar's conclusion that the unauthorized change to the purple diaphragm had caused the illegal release of 54 tons of air contaminants.

The trial court rejected all of plaintiff's claims. The court found plaintiff "failed to prove that the change from the green diaphragm to the purple diaphragm was an alteration of an equipment part in the Healy 900 System that required approval," so there was no proof defendants "ever sold or offered to sell an 'uncertified' system." The court likewise rejected the Board's claims that use of the purple diaphragms resulted in the emission of tons of air contaminants, finding the Board "ignored . . . the most basic principles of the scientific method," and proved nothing about whether in-use nozzles with purple diaphragms actually emitted excess contaminants.

The court entered judgment for defendants, and the Board filed a timely appeal.

DISCUSSION

We independently review questions concerning the construction of statutes and regulations. (*Chambers v. Kay* (2002) 29 Cal.4th 142, 148; *Joannou v. City of Rancho Palos Verdes* (2013) 219 Cal.App.4th 746, 751-752.) "[W]e apply the substantial evidence test to factual matters concerning what a party did or did not do." (*SJCBC LLC v. Horwedel* (2011) 201 Cal.App.4th 339, 345.)

The Board's appeal is premised on a single proposition. The Board asks us to hold that ***any*** alteration in a certified EVR system without prior approval from the Board – no matter how inconsequential the change, or whether the part changed was identified in the executive order certifying the system – results in an uncertified system (or component) that cannot be sold without violating the statute.

We cannot so hold. The terms of the statute and the regulations on certification simply do not allow us to reach that conclusion. The statutory and regulatory scheme clearly prohibits any change to a system or a component as specifically delineated in the

executive order certifying the system. But we cannot infer that any change in a part *not* identified, or even mentioned, in the certification order is likewise prohibited and automatically renders the system uncertified. And the Board offered the trial court no other proof that it certified the Healy EVR System or the Healy 900 nozzle based upon any specific diaphragm. In the absence of such proof, we cannot find defendants liable for the sale of uncertified components.

As we have seen, section 41954(f) applies to the sale of an uncertified system or an uncertified component. Another provision of the statute requires the Board to "enumerate the specifications used for issuing the certification." (Health & Saf. Code, § 41954, subd. (c)(2).) CP-201 requires a certification order to contain a "list of components certified for use with the system," as well as applicable performance standards, performance specifications, test procedures, and more. (CP-201, § 15.1-§ 15.1.2.) Plainly, the statute and regulations contemplate a comprehensive certification process, recording and preserving the required specifications for the certified system and each of its components in considerable detail. (The executive order certifying the Healy EVR System runs to well over 100 pages.) The absence of the diaphragm from the list of certified components in the executive orders – or from any mention, anywhere in the extensively documented executive orders – virtually mandates the conclusion the diaphragm itself was not a component of the system that was, or that was required to be, certified.

Under those circumstances, the Board was required, at the least, to prove the change in the diaphragm nevertheless somehow operated to render the system, or the nozzle, uncertified. The Board failed to do so. The Board offered no proof that it relied on any particular diaphragm when it certified the Healy EVR 900 System. For example, it did not preserve, and so did not produce, any plans, drawings or specifications from Healy System's application for certification that would demonstrate the use of any particular diaphragm during the certification process. Nor did the Board preserve the original nozzle it tested when it certified the Healy EVR System, so it is impossible to know the specifications for or composition of the diaphragm contained in that nozzle.

We note one other point concerning the Board's failure of proof.

At oral argument, counsel for Franklin Fueling observed that when the Healy EVR System was certified (in April 2005) both green and purple diaphragms existed. Counsel was mistaken, at least so far as the record in this case shows. (While DuPont advised its customers in September 2004 of its intent to discontinue production of the green material, DuPont continued to sell it until the end of 2005; Healy did not obtain the new material for testing by UL until sometime after May 18, 2005, and UL did not approve the purple diaphragm until 2006.) Nonetheless, the record *does* reflect that the Board did not prove the composition of or specifications for whatever diaphragm *was* in the Healy EVR System it certified.

The Board contends, in effect, that it did not have to prove the specifications for the diaphragm in the system it certified, because Franklin Fueling admitted that in February 2007, it began to sell systems with a diaphragm made of a new material without seeking Board approval. But these admissions – never in dispute – do not undermine the pertinent point: the Board did not prove what diaphragm was in the nozzle when the system was certified, or that it certified the system in reliance on any particular diaphragm. While it is reasonable to infer the diaphragm in the certified system was green, it was the Board's burden to prove that its certification encompassed a particular diaphragm (not just a green diaphragm), and this it entirely failed to do. The fact that Franklin Fueling persuaded DuPont in late 2007 to manufacture a new green material for the diaphragm that was *not* identical to the original green material demonstrates that color alone did not prove the composition of the diaphragm in the certified system.

Notably, the Board knew that Jim Healy (the inventor of the system and principal owner of Healy Systems) "had tested multiple sets of spring and diaphragm combinations early on before he settled on one that worked to his satisfaction." Nevertheless, the Board apparently did not consider the specifications for the combination Mr. Healy ultimately chose significant enough to designate in its certification order. Nor did the Board consistently operate as though its executive orders required every change in any

part to require certification; it approved all the changes defendants belatedly reported in May 2008 without claiming the changes resulted in an uncertified system.

Instead, the only support the Board offers for its assertion the change in the diaphragm rendered the system or nozzle uncertified is its executive order, which provides that "***any alteration in the equipment parts***, design, installation, or operation of the system ***certified hereby*** is prohibited and deemed inconsistent with this certification . . . ." (Boldface & italics added.) But the only reasonable construction of that language, in light of the statutory requirement to "enumerate the specifications used for issuing the certification," and the comprehensive nature of the certification regulations, is that "any alteration" means any alteration in the system *as certified and delineated in that order*.

As the trial court expressly found, the required "list of components certified for use with the system" in the executive orders (CP-201, § 15.1) did *not* include the diaphragm – green, purple, or otherwise: "Nowhere in those executive orders and the accompanying schematics of the system is there any identification of the ORVR recognition diaphragm. There are no specifications in the Executive Orders as to the ORVR recognition system."

We need go no further to affirm the trial court's judgment. But we pause to add that the regulations do not purport to require certification for every conceivable change. For example, section 18 of CP-201 provides for amendments to executive orders, but "[c]ertification shall not be required for components, either new or modified, determined by the Executive Officer not to affect the performance of the vapor recovery system." (CP-201, § 18.2.4) In some cases, "such as when a part number changes, an amendment to the Executive Order may be required." (*Ibid.*) In this case, it is telling that the Board does not, because it cannot, specify any provision of the executive order that would have required amendment, of a part number or anything else, if defendants had reported the change in the diaphragm. (A request for an amendment "shall include," among other items, a "[d]escription of change" and "[c]hanges to the Executive Order" such as "[s]ystem or component drawings" and other items. (CP-201, § 18.1.1–18.1.3.).)

Further, section 41954(f) forbids the sale of a system or component "unless the system or component has been certified by the state board *and is clearly identified by a permanent identification of the certified manufacturer or rebuilder*." (§ 41954(f), italics added.) The nozzle contains this permanent identification, but the diaphragm inside, so far as the record shows, does not. (Indeed, the Board's regulations for the permanent identification of system components specify that the requirement "does not apply to replacement subparts of the primary component." (CP-201, § 16.7.1.)) This suggests, at least, that the statute does not contemplate the certification of every subpart of a system's components, unless, of course, those subparts are specified in the certifying executive order.

We return to the principal point. The Board was required by statute and regulation to list, in its executive order, the components of the system being certified. The Board listed the nozzle and specifications for the nozzle (as well as 14 other components of the system), but that list and those specifications did not include any requirements for the diaphragm inside the nozzle, nor did the Board list the diaphragm itself as a "component[] certified for use with the system." (CP-201, § 15.1.)

The Board's regulations and executive orders must necessarily be construed in congruence with the statutory prohibition on the sale of uncertified components. Plainly, the executive order on its face prohibits "any alteration in the equipment parts . . . certified hereby . . . ." Just as plainly, the diaphragm was *not* "certified hereby": the executive order explicitly states that "Exhibit 1 contains a list of the equipment certified for use with the Healy Phase II EVR System . . . ." As we have seen, the diaphragm is nowhere to be found in exhibit 1, or anywhere else in the executive orders.

Whether the Board should have included specifications for the diaphragm in its executive orders is not for us to say. The Board tells us the diaphragm serves a critical function, and that seems to be so. And of course we are well aware of the hazards of gasoline vapor emission and the importance of the statutory scheme the Legislature has put in place to protect air quality. But the inescapable fact is that the executive orders make no mention of the diaphragm. We cannot construe a statute to impose civil

penalties – penalties amounting to many millions of dollars – premised on the sale of uncertified components, when the Board cannot demonstrate that it certified any particular diaphragm for use in the Healy 900 nozzle. The Board simply did not prove defendants ever sold or offered to sell an uncertified system or component.

Plaintiff insists the trial court failed to employ the "plain meaning" of the executive order, and instead held the alteration in the diaphragms did not require approval because it was not a material change. That is not so. The trial court used the word "material" once, but that was clearly not pertinent to the court's holding or rationale. The court found no violation was proved because there was no identification of the diaphragm in the executive order, no other proof of the composition of the diaphragm that was in the system when it was certified, and consequently no proof the alteration required approval. We can find no error in those conclusions.

Because there was no proof of the statutory violation underlying the Board's complaint, we need not consider the Board's additional contention the trial court erred when it also found the Board "utterly fail[ed] to establish that the use of the purple diaphragm resulted in the emission of tons of air contaminants." Even if this claim could stand alone, the trial court was plainly correct when it concluded, among other things, that "[t]he limited testing of one nozzle out of 7,551 is not a statistically significant sampling from which one can extrapolate any meaningful data," and the subsequent testing on modified or "out of the box" nozzles "prove[d] nothing in terms of whether in use nozzles with purple diaphragms actually emit excess contaminants into the air." There was no error.

DISPOSITION

The judgment is affirmed. Defendants shall recover their costs on appeal.

GRIMES, J.

I CONCUR:

BIGELOW, P. J.

RUBIN, J. – Concurring in part and dissenting in part

As recent events concerning one auto manufacturer's efforts to conceal unfavorable emissions performance shows, there is a constant tug of war between business and state agencies over the regulation of pollution related to the automotive industry. Although the present controversy is more limited in scope, it raises similar issues concerning back-door efforts to conceal from regulators changes to air pollution control systems, an issue of great concern with environmental consequences for all Californians.

We are presented here with two questions: One, did the California Air Resources Board present substantial evidence that Franklin's conduct produced an illegal level of emission of air containments. I concur in that portion of the majority opinion that concluded that proof of excess emissions was legally inadequate. The second question is whether Franklin made an unauthorized change to the vapor recovery system certified by the California Air Resources Board. The majority concluded that the modifications to the system that Franklin made were consistent with Franklin's legal obligations. I disagree.

The majority views this as a simple matter of legislative and regulatory interpretation. It concludes the regulations require the board to identify the components it certifies for gasoline vapor recovery systems; because the Board did not list the recognition diaphragm as one of those components, then Franklin was free to use a different diaphragm without first obtaining Board approval. I believe the majority has adopted a cribbed interpretation of the applicable regulations and statutes, in part by failing to account for all the evidence, and in part by failing to acknowledge and implement the relevant rules of statutory and regulatory interpretation. A proper analysis of these issues requires a fuller recital of the evidence and the applicable law.

STANDARD OF REVIEW AND STATUTORY CONSTRUCTION

The majority states that we independently review the construction of statutes and regulations, and that we apply the substantial evidence test to the extent factual questions concerning the applicability of statutes and regulations are involved.

These statements are correct insofar as they go, but do not give a complete picture of the applicable standard of review. We do not exercise our independent review in a vacuum. Instead, we interpret the applicable statutes under the rules of statutory construction. (*Joannou v. City of Rancho Palos Verdes* (2013) 219 Cal.App.4th 746, 751-752.) Because the Legislature delegated to the Board the authority to adopt regulations concerning vapor recovery systems, those regulations are quasi-legislative and are interpreted the same as statutes. (*County of Sacramento v. State Water Resources Control Board* (2007) 153 Cal.App.4th 1579, 1586; *In re Vaccine Cases* (2005) 134 Cal.App.4th 438, 450.) The same is true of the Board's executive orders certifying the Franklin vapor recovery system. (*City of Morgan Hill v. Bay Area Air Quality Management District* (2004) 118 Cal.App.4th 861, 877.)

Under the rules of statutory interpretation our primary task is to determine the legislative intent. We first examine the words used and give them a plain and commonsense meaning. If the language is clear and unambiguous, there is no need to construe the provision. (*Harbor Regional Center v. Office of Administrative Hearings* (2012) 210 Cal.App.4th 293, 310 (*Harbor Regional*).) However, the literal meaning of a statute must match its purpose. The meaning cannot turn on a single word or sentence. Instead, the words must be construed in context, and provisions that relate to the same subject matter or are part of the same statutory scheme must be read together and harmonized to the extent possible. (*Id.* at pp. 310-311.)

When a statute is ambiguous, we "must select a construction that best fits the Legislature's apparent intent; promotes instead of defeats the statute's general purpose; and avoids absurd or unintended consequences. [Citation.] The statute cannot be construed in a way that would make its provisions void or ineffective, especially if that

would frustrate the underlying legislative purpose." (*Harbor Regional, supra,* 210 Cal.App.4th at p. 311.)

As for the Board's regulations, we must construe them in light of the intent of the enabling legislation. (*WaterKeepers Northern California v. State Water Resources Control Bd.* (2002) 102 Cal.App.4th 1448, 1461.) We also defer to the Board's interpretation of its own regulations unless it is inconsistent with the enabling legislation. (*Communities for a Better Environment v. State Water Resources Control Bd.* (2003) 109 Cal.App.4th 1089, 1103-1104.)

The proper application of these rules should lead to a reversal of the judgment for Franklin arising from its unauthorized use of a substitute recognition diaphragm.

DISCUSSION

1. *Background on the Hazards of Gasoline Vapor Emissions*

Dr. Deborah Drechsler testified for the Board about air pollution sources and state and federal laws regulating the emission of air contaminants. According to Drechsler, the federal Clean Air Act (42 U.S.C. § 7401 et seq.) sets national air quality standards for certain pollutants, including ozone (42 U.S.C. § 7409). The San Joaquin Valley and South Coast Basin of California are considered areas of "extreme nonattainment" with federal clean air standards.

Ozone is created when volatile organic compounds such as those found in gasoline vapor react with oxides of nitrogen in the presence of sunlight in the lower atmosphere. Ozone has been linked to health risks in the elderly and the very young, including asthma and other respiratory ailments. It can also damage crops and other plant life.

Gasoline vapor also contains the known carcinogen benzene, which is considered a toxic air contaminant. Benzene exposure cumulatively increases cancer risk.

2. *The Law Applicable to Controlling Gasoline Vapor Emissions*

The Legislature has found that the people of California have a "primary interest" in the physical environment and that air pollution is detrimental to their health, safety and welfare. (Health & Saf. Code, § 39000.)

[1] The Legislature created the California Air Resources Board to protect air quality in the state, including the adoption of standards, rules, and regulations necessary to execute its powers. (§§ 39600, 39601.) In order to comply with the federal Clean Air Act, the Board has been designated as the air pollution control agency for all purposes set forth in federal law. (§ 39602.)

The Board is required to adopt procedures to control the emission of gasoline vapors during refueling, including performance standards for, and the certification of, vapor recovery systems. (§ 41954.) No one shall sell, offer to sell, or install a new or rebuilt vapor recovery system or the components of such a system unless the Board has certified them. (§ 41954, subd. (f).)

By way of an administrative regulation, the Board adopted a vapor recovery certification protocol known as CP-201. (Cal. Code Regs., tit. 17, § 94011, hereafter Regulation 94011.) CP-201 sets forth the certification standard of 95 percent vapor recovery efficiency, limiting emissions per nozzle to .38 pounds per 1,000 gallons of fuel dispensed. CP-201 permits changes to certified systems with Board approval, and extends that provision to both previously certified components as well as the use of new components that were not previously certified.[2] Requests to use alternate or replacement

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[1] All further section references are to the Health and Safety Code.

[2] Section 18 of CP-201 allows for requests to add alternate or replacement components to a certified system, which may be either "originally certified components, components originally certified on another system, or new components." Section 18.2 of CP-201 permits modification of "vapor recovery components certified as part of a system;" section 18.2.3 of CP-201 requires Board approval to add new components that "have not previously been certified with a system."

components are subject to an engineering evaluation to determine the level of testing required.

Guidance for interpreting and applying CP-201 is found under the preamble-like heading "GENERAL INFORMATION AND APPLICABILITY," which states: "Vapor recovery systems are complete systems and shall include all associated dispensers, piping, nozzles, couplers, processing units, underground tanks *and any other equipment or components necessary for the control of gasoline vapors* . . . ." (Italics added.) In accordance with CP-201, the executive order certifying the Franklin vapor recovery system prohibited "any alteration in the equipment, parts, design, installation, or operation *of the system certified hereby*" without first obtaining approval from the Board. (Italics added.)

To emphasize the point, CP-201 refers to complete vapor recovery systems and states that any alteration of the parts of a Board certified system is prohibited without Board approval.

Section 42402 states that those who violate various provisions of the California Air Resources Board statutory scheme, including section 41954 – the certification provision – are strictly liable for civil penalties of $1,000 if the violation was not negligent or intentional, and of $10,000 if it was. (§ 42402, subds. (a), (b).)

3. *The Record Establishes an Unauthorized Change in the Diaphragms*

Paragraph 20 of the Board's complaint alleged that vapor recovery alarms had been triggered by a purple recognition diaphragm that had been made with a "mold and a material that was different from that submitted . . . for [Board] certification." In response, Franklin's verified answer admitted that the diaphragms had been "made with a new base rubber material and that the diaphragm manufacturer employed a new mold in the production of . . . diaphragms," neither of which were submitted for Board approval.

The admission that a new material and mold were used in response to an allegation that a change was made from the diaphragm submitted for testing is a binding judicial

admission that the purple diaphragm was not the one submitted by Franklin when its vapor recovery system was tested and certified by the Board. (*Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal.App.4th 1112, 1155.) As a result, no contrary evidence was allowed on those points, any finding adverse to the admitted facts drops from the record, and any legal conclusion not upheld by the remaining facts is erroneous. (*Ibid.*)

This admission is bolstered by certain uncontradicted evidence. In response to requests for admission, Franklin admitted that the purple diaphragm was not used during the 2004 certification testing process and was never approved by the Board as a modified or new component. Donald Kenney, Franklin's president, acknowledged that the old diaphragms were green and the new ones purple. The change was not merely from green to purple; rather different material was used. This was documented in an October 2007 letter to Franklin from the third-party manufacturer of the diaphragm. That letter identified the precise material used to manufacture both the original green and substitute purple diaphragms. The new diaphragms were made from a heavier material, had a differently shaped lip, and were manufactured with a different production mold. Paul Marzilli, who took part in the Board's certification process of the Franklin vapor recovery system, testified that the diaphragms he tested were green. Ranjit Bhullar, the Board's lead investigator into the cause of the vapor recovery alarms, testified that the recognition diaphragm was a "key" and "critical" component of the vapor recovery system. Finally, Franklin's product manager for the vapor recovery system testified that the purple diaphragm actually tested could not meet the required emissions standards, but was unable to reach any conclusions as to the 7,551 nozzles with purple diaphragms that were in use statewide.[3]

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[3] The majority devotes a substantial portion of its statement of facts recounting the weak evidence the Board produced at trial to support its excess contaminant claims. Despite the Board's failure to prove that Franklin's conduct caused the release of massive gasoline vapor emissions, the evidence and Franklin's judicial admissions establish that the purple diaphragms did not perform as well as the original green diaphragms.

When Franklin's judicial admissions are combined with this undisputed evidence, it is apparent that the diaphragm tested by the Board and initially put into production by Franklin was the original green one made from the material identified by the diaphragm manufacturer. Franklin does not dispute in its appellate briefs that the unauthorized change occurred, and has never contended that some other diaphragm was tested during the certification process.[4] Franklin's answer also admitted the following: that beginning in February 2007 it sold and offered to sell Healy nozzles that contained diaphragms made from the new purple material; and that the new diaphragms caused at least some nozzles to perform below the Board's vapor recovery standards.

In short, the record establishes that the Healy vapor recovery system was tested and certified based in part on the performance of the original green diaphragm and that, without seeking Board approval, Franklin sold nozzles with the purple diaphragm, at least some of which failed to meet the mandated vapor recovery standards.

4. *Franklin Violated Subdivision (f) of Section 41954*

The Board sued Franklin for violating section 41954, subdivision (f), which states that no one may sell, offer to sell, or install "a vapor control system, or any component of the system, unless the system *or component* has been certified by the [Board]. . . ." (§ 41954, subd. (f), italics added.) As I read this statute, it means that Franklin could not sell or install a vapor recovery system unless that system had been certified, and could

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The majority also notes that Franklin had the new diaphragms tested by the Underwriters Laboratories (UL). That testing was for safety purposes only and had nothing to do with whether the new diaphragms met the Board's vapor recovery standards.

[4] At oral argument, counsel for Franklin suggested that there was no way of knowing whether the purple diaphragm had been tested during the certification process. Not only is the assertion contrary to Franklin's position throughout this proceeding, it is plainly wrong.

not sell or install a component for use in a certified system unless that component had also been certified.

As discussed above, there is no dispute that the Franklin vapor recovery system had been certified based in part on the use of the original green diaphragm. Nor is there any dispute that Franklin sold certified nozzles containing the uncertified purple diaphragm with the obvious intent (and end result) that they be included as part of the overall certified vapor recovery system at filling stations throughout the state. The net effect of this conduct was the sale of uncertified components – the purple diaphragms – for installation and use in a certified system, in violation of section 41954, subdivision (f).

As noted earlier, the majority concedes that the unauthorized change occurred, but contends, as the trial court found, that the board's failure to expressly certify the original green diaphragm, combined with the absence of evidence concerning its composition, was fatal to the Board's claim that an unauthorized change occurred.

This argument appears to branch off in two directions: (1) the Board's prohibition against changing parts applied to only those parts expressly certified, meaning that the Board's failure to specify the original green diaphragm in its certification order left Franklin free to make the switch; and (2) the absence of evidence concerning what had been originally certified left the Board unable to prove that Franklin had made an unauthorized change to a certified system.

5. *The Board's Failure to Identify the Original Diaphragm In Its Certification Order Did Not Permit the Use of A Different Diaphragm*

Under section 11.1 of CP-201, Franklin's application for Board certification had to include "a complete description of the system concept, design and operation, including but not limited to" a listing of components.[5] Section 15.1.1 of CP-201 states that the certification order shall include "[a] list of components certified for use with the system."

[5] The Board did not produce a copy of Franklin's certification application.

Consistent with this, the prohibition against unauthorized modifications found in section 18.2.1 of CP-201 applies to "vapor recovery *components* certified as part of a system." (Italics added.) Taken together, these provisions could be read to support the majority's contention that the Board's failure to list the green recognition diaphragm in its certification order shows that it was not certified and that, as a result, Board approval was not required to modify that component.

The certification order itself points in both directions. In some places the certification order refers to the certification of individual components. As discussed earlier, however, its prohibition against alterations applies to the "equipment parts, design, installation, or operation *of the system certified hereby* . . . ," suggesting, as the Board contends, that its approval was required because the green diaphragm was part of the certified vapor recovery system even if the diaphragm was not listed separately. (Italics added.)

I agree that these provisions create some ambiguity about the effect of the Board's failure to identify a particular component as certified. I believe this ambiguity is resolved by CP-201's general applicability guideline, which defines vapor recovery systems as "complete systems" that include a variety of specified equipment, including any other "equipment or components necessary for the control of gasoline vapors . . . ." In short, the term "system" is comprehensive shorthand for not just the whole, but for those parts deemed critical to its operation as well. By that standard, certification of the Healy vapor recovery system necessarily encompassed the original green diaphragm, which was by all accounts a critical component of that system.

I understand the majority's discomfort with the Board's failure to list the diaphragm in the certification order. Apart from the fact that the Board was obligated to do so by its own regulations, it is hard to comprehend why the Board would not specify all the components it relied on when testing the device, or preserve a sample for verification and comparison purposes. Regardless of what caused this omission, however, the question before us is whether under the applicable statutory and regulatory

scheme the Board's failure to specify the diaphragm in its certification order allowed Franklin to alter the design or composition of the diaphragm without Board approval.

Applying the rules of statutory construction, our task is to interpret the statutory and regulatory scheme in a way that make its provisions effective and promotes the underlying legislative purpose. (*Harbor Regional, supra,* 210 Cal.App.4th at p. 311.) Although most of the argument has focused on the regulatory testing protocol (CP-201) and the terms of the certification order, both are subordinate to their enabling legislation – section 41954 – and are invalid to the extent they are inconsistent with that provision. (*Esberg v. Union Oil Co.* (2002) 28 Cal.4th 262, 269.)

This takes us back to section 41954, subdivision (f), which, as I read it, prohibits the sale or installation of an uncertified component – such as the substitute purple diaphragm – for use in a certified system. The Board interprets its regulations and certification orders the same way. Whatever ambiguities exist in the certification protocol regulation or the certification order must be resolved in deference to the Board's interpretation, which is consistent with the terms of the enabling legislation. (*Communities for a Better Environment v. State Water Resources Control Bd., supra,* 109 Cal.App.4th 1089 at pp. 1103-1104.)

This interpretation is also consistent with the Legislature's finding that the public has a "primary interest" in clean air (§ 39000), along with its mandate that the Board adopt clean air policies to implement federal clean air standards, including a statewide vapor recovery system. (§§ 39600-39602, 41954.) Otherwise, should questions ever arise about the adequacy of a Board equipment certification designation, manufacturers might be free to exploit a regulatory ambiguity and decide for themselves whether a substitute component would perform as well as the component the Board actually tested.[6]

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[6] Franklin has never contended that it relied on the absence of the diaphragm from the Board's list of certified equipment when deciding that it could switch to a differently constructed diaphragm without Board approval. Instead, its decision appears to have been an act of corporate expediency that it now seeks to excuse by its after-the-fact reliance on a regulatory ambiguity.

Instead of addressing how its interpretation fosters the legislative intent behind the statutory scheme governing the certification of vapor recovery systems, the majority narrowly focuses on those portions of the ambiguous regulatory language that support Franklin. The majority does so in part by recasting the issue as follows: whether "**any** alteration in a certified EVR system without prior approval from the Board – no matter how inconsequential the change, or whether the part changed was identified in the executive order certifying the system – results in an uncertified system (or component) that cannot be sold without violating the statute." (Slip opn. at p. 10, original boldface.)

That is not the issue framed by the Board's appellate briefs. This case is not about an unauthorized change in minor parts such as screws or other fasteners. It is about the unauthorized change to a critical component – the vapor recovery recognition diaphragm. As a component "necessary for the control of gasoline vapors," CP-201 made the diaphragm part of the complete certified system.

The majority also partially quotes subdivision (c)(2) of section 41954 to supports its conclusion that the Board's failure to specify the original diaphragm was fatal to its claim: "The state board shall enumerate the specifications used for issuing the certification." The majority omits the second sentence of that provision, which states that the Board shall revoke or modify a certification order if the system "no longer meet[s] the required specifications or standards . . . ." Subdivision (a) of section 41954 requires the Board to set forth "performance standards." When these provisions are read together, it is clear that subdivision (c)(2) requires the Board to specify the performance standards (i.e. the specifications) a system must meet in order to obtain certification, not the component parts of the system.[7]

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[7] The majority also rejects the Board's contention that the trial court imposed a requirement that unauthorized changes to a system's components are not actionable unless the changes were material. I disagree.

The trial court focused on the Board's failure to produce evidence of the original diaphragm's composition, finding as a result no evidence that the change in material or manufacturing process "was a material alteration of the system." This implies a

Finally, the majority's holding creates the following conundrum: if the original green diaphragm was not certified, then Franklin necessarily violated section 41954, subdivision (f) by installing that diaphragm into the vapor recovery system. The absurdity of such a result points the analytical compass needle in the opposite direction.

CONCLUSION

The evidence shows that the recognition diaphragm was a critical component of the vapor recovery system. The evidence also establishes that the Board necessarily tested and relied on the effectiveness of the original green diaphragm when it certified the Healy system. Despite this, the majority holds that Franklin was free to replace that diaphragm with a substitute made from different material through a different manufacturing process without Board approval because the Board did not list the green diaphragm as a certified part.

There is no doubt that the regulatory scheme is ambiguous. However, the statutory directive embodied in section 41954, subdivision (f) is not. Nor are the policies underlying the creation of the Board, which the Legislature tasked with protecting air quality in the state and complying with federal clean air standards. (§§ 39600-39602.) The Legislature has also found that the people of California have a "primary interest" in clean air. (§ 39000.) These policies are undermined by the majority's holding, which allows manufacturers to decide for themselves whether a substitute for a critical component would perform the same as the original part. That is precisely what happened

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presumed equivalency between the two diaphragms, and suggests the result would have been different had there been evidence showing a material difference between the two.

I believe that the trial court erred by requiring proof of a material change in a key component like the diaphragm because use of the word "any" shows an unambiguous regulatory intent to broadly apply the prohibition against unapproved changes. (See *Souza v. Lauppe* (1997) 59 Cal.App.4th 865, 873 [use of the word "any" shows Legislature's unambiguous intent to broadly apply a statute].) The majority's conclusion also means that it is the company not the regulator that determines in the first instance whether a change is material. This result seriously undermines the policies of the legislative scheme. The majority's holding is also be inconsistent with section 41954, subdivision (f) because it allows the sale and installation of uncertified components into a certified system.

here: Franklin decided for itself – incorrectly – that the purple diaphragm would consistently and comprehensively maintain the required vapor recovery standards, a decision the Board was empowered and best positioned to make.

Once the terms of the regulations and certification order are reconciled with this enabling legislation, it becomes clear that under CP-201, the original diaphragm was part of the certified system. Under the express terms of the certification order, Franklin was prohibited from making unauthorized changes to the equipment or parts of the certified system. Therefore I would reverse the judgment as to the cause of action for violating section 41954, subdivision (f) and remand for a new trial on the issue of damages.

RUBIN, J.